Supreme Court, U.S.
FILED

No. 03-17090 05-503 AUG 18 2005
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# In the Supreme Court of the United States

**Michael A. Sylver, Petitioner**

*v.*

**The Securities and Exchange Commission**

***ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATED COURT OF APPEARLS FOR THE NINTH CIRCUIT***

## PETITION FOR A WRIT OF CERTIORARI

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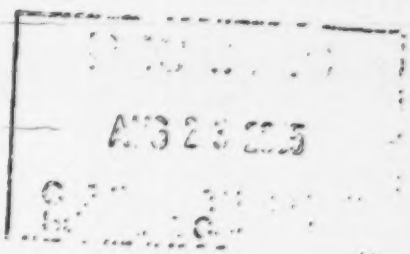


## QUESTION PRESENTED

Whether petitioner was denied procedural and substantive due process by the District Court's refusing to allow him, during direct and cross-examination, to refer, pursuant to Rule 612 of the Federal Rules of Civil Procedure (FRCP), to refer to documents and writings, whether or not admissible in evidence, in order to refresh his recollection of events that took place several years prior to trial.

## PARTIES TO THE PROCEEDINGS

Petitioner is Michael A. Sylver.
Respondent is the United States Securities and Exchange Commission.

## TABLE OF CONTENTS

PETITION

OPINIONS BELOW

JURISDICTION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOVLED

STATEMENT

CONCLUSION

APPENDIX

## TABLE OF AUTHORITIES

### STATUTES

28 U.S.C.

28 U.S.C., Section 1332.

Fed. R. Evid. 612

Fed. R. Evid. 803.5

### CASES

*Advanced Systems, Inc. v.* Kent *State University,* 212 F.3d 1272, 1284 (Fed. Cir. 2000).

*Annette Rush, v. Illinois Central Railroad Company,* 399 F.3d 705; 2005 U.S. App. LEXIS 3624; 2005 Fed App. 0106P (6th Cir. 2004)

*Barrer v. Women's National Bank*, USDC, Dist Columbia, 96 F.R.D. 202, at 203, 204, 35 Fed. R. Serv.

*Jacobson v. Amtrak*, USDC, ND IL., Eastern Div., 200 U.S. Dist. LEXIS 20924, at 13, Note 1 (2000).

*James Julian, Inc. v. Raytheon Co.*, USDC, Dist. Del., 93 F.R.D. 138, at 144 (1982).

*Marshall v. United States Postal Service*, USDC, Dist. Columbia, 88 F.R.D. 348, 30 Fed. R. Serv. 2d 1263 (1980).

*M.B., a minor, vs. Women's Christian Alliance,* U.S. Dist Ct., Eastern Dist. Penn, 2002 Dist. LEXIS 10105

*Suss v. MSX Int'l. Eng'g. Svcs.*, USDC, SDNY, 212 F.R.D., 159 (2002).

*Town of Columbus v. Loren Robert Harrington*, 2001 Mont 258, 307 Mont. 215, 36 P.3d 937 2d 1052 (1982).

*United States of America v. Donald D. Faulkne* , 538 F.2d 724, 1976 U.S. App. Lexis 8102.

*United States. v. Lane,* 474 438, 106 S. Ct. 725, 832, 833 (1986).

IN THE SUPREME COURT OF THE UNITED STATES

No. 03-17090

**MICHAEL A. SYLVER, PETITIONER,**

**V.**

**THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION**

**PETITION FOR A WRIT OF CERTIORARI**

The petitioner, Michael A. Sylver, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

**OPINIONS BELOW**

The opinion of the Court of Appeals was not published. It is set forth verbatim in Appendix A to this Petition. The decision of the District Court was also unpublished.

## JURISDICTION

The Judgment of the Court of Appeals was entered on May 20, 2005. There was no petition for rehearing. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1). This matter was before the United States District Court for Nevada based on subject matter jurisdiction. 28 U.S.C., Section 1332.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides for procedural and substantive due process of law; "...no person shall be deprived of life, liberty, or property without due process of law".

Federal Rule of Evidence (FRE) 612 provides:

"Except as otherwise provided in criminal proceedings by section 3500 of title 18 United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either –
(1) while testifying, or
(2) before testifying, if the court in its discretion determines an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to

introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so requires, declaring a mistrial."

Fed. R. Evid. 803.5:
(5) Recorded Recollection)
"A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly If admitted, the memorandum or record may be read into evidence, but may not itself by received as an

exhibit unless offered by an adverse party.

## STATEMENT

This case involves the interpretation and application of *Fed. R. Evid.* 612 which allows a witness to refer to writings which may, or may not, themselves be admissible, but which materially assist the witness to refresh his or her recollection. *M.B., a minor, vs. Women's Christian Alliance,* U.S. Dist Ct., Eastern Dist. Penn, 2002 Dist. LEXIS 10105. Such writings are not made inadmissible by the hearsay rule when they are "[a] memorandum or record concerning a matter about which a witness once had knowledge, but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory, and to reflect that knowledge correctly." *Fed. R. Evid.* 803.5.

The District Court case alleged, *inter alia*, that petitioner received, "undisclosed cash and stock" from the public corporation he headed and/or that he failed to provide contemporaneous documentation for various cash withdrawals from corporation's accounts. Throughout petitioner's direct testimony the Commission consistently objected to his referring to receipts and related documents to refresh his recollection in explaining certain cash transactions.

The District Court repeatedly sustained those objections to which defense counsel took exception. The Commission's success in all such motions resulted largely from their repeated claim they would be prejudiced if Sylver were permitted to rely on such documents for testimony, based on their claim they had not had access to them yet these exact documents had been numbered and copied by the Commission years earlier as part of their investigation. (The accounting records of the corporation had been kept on Peachtree accounting system per the testimony of numerous witnesses and both auditors. Those records had been maliciously destroyed by one time corporate bookkeeper Linda McGee who was an adverse person, associated with one Charles Kricfalusi against whom a default judgment was previously obtained.)

As a result of the court's sustaining plaintiff motions to prevent the petitioner to refreshing his recollection by reference to the only documents available to him, petitioner was put in the unfair and highly prejudicial position of trying to explain from memory detailed transactions that had occurred some four to seven years earlier. He was thus denied his only possible defense as to his proper allocation of monies.

As these documents would have enabled Sylver to fully account for the $232,000 of cash and credit card charges the court ordered him to "disgorge" to the

SEC, and because concerns about the accuracy of Sylver's testimony were the basis in part of the imposition of the permanent Officer and Director bar, they were clearly "outcome determinative". *Advanced Systems, Inc. v.* Kent State University, 212 F.3d 1272, 1284 (Fed. Cir. 2000). Therefore, Sylver was effectively denied procedural and substantive "due process", i.e. a full and fair opportunity to present his defense.
"But if one can not say, with fair assurance, after pondering all that happened, without stripping erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected."..... "If so, or if one is left in great doubt, the conviction can not stand". *US. v. Lane*, 474 438, 106 S. Ct. 725, 832, 833 (1986).

The right of a witness to refresh his recollection from documents whether or not they are admissible in evidence, though widely recognized is in need of clarification.

While the trial judge is granted wide discretion in the admissibility of evidence, it is not a free-for-all. Centuries of jurisprudence on the implications of the Fifth Amendment have

clearly been designed to protect the right to a fair trial of the issues and ensure that no one is unfairly deprived of what can reasonably provide for his defense. Substantive Due Process requires this protection.

Documents need not be admitted or admissible in evidence in order to be used to refresh the recollection of a witness. *United States of America v. Donald D. Faulkner*, 538 F.2d 724, 1976 U.S. App. Lexis 8102. The law is well settled that a witness may refer to a writing to refresh his recollection. *Town of Columbus v. Loren Robert Harrington*, 2001 Mont 258, 307 Mont. 215, 36 P.3d 937. *Barrer v. Women's National Bank*, USDC, Dist Columbia, 96 F.R.D. 202, at 203, 204, 35 Fed. R. Serv. 2d 1052 (1982). *James Julian, Inc. v. Raytheon Co.*, USDC, Dist. Del., 93 F.R.D. 138, at 144 (1982). *Marshall v. United States Postal Service*, USDC, Dist. Columbia, 88 F.R.D. 348, 30 Fed. R. Serv. 2d 1263 (1980). *Jacobson v. Amtrak*, USDC, ND IL., Eastern Div., 200 U.S. Dist. LEXIS 20924, at 13, Note 1 (2000). *Suss v. MSX Int'l. Eng'g. Svcs.*, USDC, SDNY, 212 F.R.D., 159 (2002). *Annette Rush v. Illinois Central Railroad Company*, 399 F.3d 705; 2005 U.S. App. LEXIS 3624; 2005 Fed App. 0106P (6th Cir. 2004).

Where an officer bar is involved which impinges on the livelihood, employability, reputation (i.e. the defendant having his name publicly displayed on the internet , etc.) it is all the more urgent that the Supreme Court craft protection of the most cherished values and rights of due process. While government regulatory bodies are mandated by Congress to certain tasks, they cannot become "supra-Constitutional entities" that need have no regard for constitutional protections of the ordinary citizen. In their zeal to make a showing of accomplishment, regulatory bodies such as the Securities and Exchange Commission cannot by allowed to encroach upon the fundamental rights of Due Process of Law.

Here the Supreme Court should grant this petition because it affords the court the opportunity to craft language which would prevent a Government plaintiff from abusing its superior position to entrap a defendant into potentially slipping under duress with respect to multitudinous details from four to seven years ago - all in the name of testing the credibility of the witness while giving the witness an impossible task.

This court could craft a rule which would providing that where key documents had been destroyed the ability of a defendant to refer the only documents available to refresh his memory is protected, not

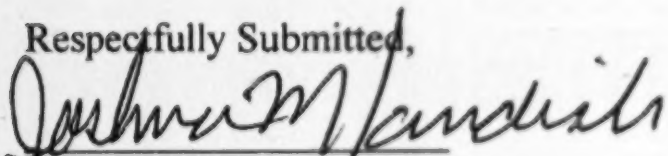
stripped away on a technicality. Such a rule could 1) protect against technical traps and assure that Fifth Amendment rights are inviolable, i.e. superior to judicial expediency, and 2) ensure trial courts protect the interests of truth and fair trial of the issues rather than yielding to misapplications of the Federal Rules of Evidence in a manner that obfuscates truth and violates the intent of due process.

This court ought to make clear that in such circumstances Due Process outweighs the trial court's discretion in order to safe guard the defendant's right to due process of law.

## CONCLUSION

The writ of certiorari should be granted.

Respectfully Submitted,



Joshua M. Landish, Esq.
Thomas R. Port, Attorneys

## APPENDIX

**NOT FOR PUBLICATION**

SECURITIES AND EXCHANGE COMMISSION,

NO. 03-17090

Plaintiff-Appellee,
D.C. No. CV-01-00229-RLH

v.

AMAZON NATURAL TREASRUES, INC.,

MEMORANDUM*

Defendant,

and

MICHAEL A. SYLVER,

Defendant-Appellant

---

Appeal form the United States District Court
For the District of Nevada
Roger L. Hunt, District Judge, Presiding

Argued and Submitted April 15, 2005,
San Francisco, California

Before: Lay**, B. Fletcher, and Hawkins, Circuit Judges

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3

**The Honorable Donald P. Lay, Senior United States Circuit Judge for he Eighth Circuit, sitting by designation.

Michael A. Sylver, the president and chief executive officer of Amazon Natural Treasures, Inc., appeals the order and judgment of the United States District Court for the District of Nevada. The district court imposed a permanent officer or director bar upon Sylver, ordered Sylver to disgorge a total of $232,322, plus all promissory notes inuring to his benefit, and assessed a third-tier statutory penalty against Sylver in the amount of $120,000. On appeal, Sylver, contends that the district court abused its discretion at trial by excluding certain documents proffered by Sylver, and by overruling Sylver's objections to the Securities and Exchange Commission' (SEC's) summary exhibits and testimony. Sylver also challenges the district court's imposition of a permanent officer and director bar, disgorgement, and third-tier statutory penalties.

We find the district court did not abuse its discretion by excluding certain documents proffered by Sylver at trial or by denying Sylver's related motion for a new trial. The documents were excluded by the district court because Sylver failed to timely respond to discovery requests by the SEC. Whether the SEC was in possession of the excluded documents prior to its motion to exclude the documents is irrelevant. Moreover, none of the documents proffered by Sylver were newly discovered, and all of them were in his possession well in advance of trial.

We also find that the testimony of SEC Staff Accountant Ann C. Romero was properly admitted into evidence by the district court as summary testimony within the meaning of Rule 1006 of the Federal Rules of evidence. Romero's testimony was presented "in the form of a chart, summary, or calculation." Fed R. Evid. 1006. It involved the organization and presentation of voluminous financial records, not the application of interpretive expertise to financial records. Additionally the information contained in Romero's summaries was available to Sylver during discovery. The district court also did not abuse its discretion with regard to a continuance: the court offered Sylver's counsel more time but he did not accept it.

Lastly, we find the district court did not abuse its discretion by permanently barring Sylver from being an officer and director of a publicly held corporation, ordering Sylver to disgorge his gains and promissory notes, and ordering Sylver to pay a third-tier penalty. The evidence demonstrated that Sylver had taken sums of at least the amount the district court ordered him to disgorge, and there is no question that Sylver was unjustly enriched by his numerous violations of the securities laws. SEC v. First Pac. Bancorp , 142 F.3d 1186, 1191 (9th Cir. 1998)

The district court also acted well within its power when it assessed a third-tier penalty against Sylver. In accordance with section 20(d) of the Securities Act, the district court found that Sylver had engaged in fraud, deceit, and manipulation in deliberate disregard of a regulatory requirement, and that his violation resulted in "substantial losses to other persons." 15 U.S.C. § 77t(d)(2)(C). The district court's decision was supported by ample evidence. (1)

Given Sylver's abuses, which have been well documented

in the record, the district court also acted within its discretion when it imposed a permanent officer or director bar upon Sylver pursuant to 15 U.S.C. § 78u(d)(2). A district court has substantial discretion when deciding whether to impose an officer or director bar. First Pac. Bancorp., 142 F.3d at 1193. In Sylver's case, the district court offered a host of legitimate reasons why Sylver was substantially unfit to serve as an officer or director of a publicly held corporation.

For the foregoing reasons, we AFFIRM the district court except as modified by footnote 1.

(1) Although not contested by Sylver, the SEC notes that the third-tier penalty amount of $120,000 reflects the inflation adjustment prescribed by regulation for violations occurring after February 2, 2001. Because Sylver's violations occurred before February 2, 2001, however, the applicable inflation-adjusted amount should be $110,000. See 17 C.F.R. § 201.1001 & tbl. I. Accordingly, we correct this error and lower Sylver's third-tier penalty amount to $110,000. We also commend the government for noting the discrepancy.

Supreme Court, U.S.
FILED

No. 03-17090 05-503 AUG 18 2005

OFFICE OF THE CLERK

# In the Supreme Court of the United States

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**Michael A. Sylver, Petitioner**

*v.*

**The Securities and Exchange Commission**

***ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATED COURT OF APPEARLS FOR THE NINTH CIRCUIT***

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## PETITION FOR A WRIT OF CERTIORARI

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# SUPPLEMENTAL APPENDIX

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**NOT FOR PUBLICATION**

**FILED MAY 20, 2005**
**CATHY A. CATTERSON CLERK**
**U.S. COURT OF APPEALS**
NO. 03-17090

SECURITIES AND EXCHANGE

COMMISSION, D.C. No. CV-01-00229-RLH
Plaintiff-Appellee,

v.

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Defendant,

and

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Lastly, we find the district court did not abuse its discretion by permanently barring Sylver from being an officer and director of a publicly held corporation, ordering Sylver to disgorge his gains and promissory notes, and ordering Sylver to pay a third-tier penalty. The evidence demonstrated that Sylver had taken sums of at least the amount the district court ordered him to disgorge, and there is no question that Sylver was unjustly enriched by his numerous violations of the securities laws. SEC v. First Pac. Bancorp , 142 F.3d 1186, 1191 (9th Cir. 1998)

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Given Sylver's abuses, which have been well documented

in the record, the district court also acted within its discretion when it imposed a permanent officer or director bar upon Sylver pursuant to 15 U.S.C. § 78u(d)(2). A district court has substantial discretion when deciding whether to impose an officer or director bar. First Pac. Bancorp., 142 F.3d at 1193. In Sylver's case, the district court offered a host of legitimate reasons why Sylver was substantially unfit to serve as an officer or director of a publicly held corporation.

For the foregoing reasons, we AFFIRM the district court except as modified by footnote 1.

(1) Although not contested by Sylver, the SEC notes that the third-tier penalty amount of $120,000 reflects the inflation adjustment prescribed by regulation for violations occurring after February 2, 2001. Because Sylver's violations occurred before February 2, 2001, however, the applicable inflation-adjusted amount should be $110,000. See 17 C.F.R. § 201.1001 & tbl. I. Accordingly, we correct this error and lower Sylver's third-tier penalty amount to $110,000. We also commend the government for noting the discrepancy.

# JUDGEMENT IN A CIVIL CASE

SECURITIES AND EXCHANGE

COMMISSION,

Filed 2003 JUN 2 P

.C. No. CV-01-00229-RLH(RJJ)

Plaintiff

v.

AMAZON NATURAL TREASURES, INC.,

and MICHAEL A. SYLVER,

Defendant

---

Decision by the Court. This action came to be heard by the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDRED AND ADJUDGED JUDGMENT IS ENTERD in favor or the plaintiffs.

ACCORDINGLY:

IT IS HEREBY ORDRED defendant Michael A. Sylver shall, and is hereby, permanently barred from serving as an officer or director of any publicly held corporation.

IT IS FURTHER ORDERED that Defendant Michael A. Sylver pay a Third Tier Penalty in the amount of $120,000.00
IT IS FURTHER ORDERED that Defendant Michael A. Sylver disgorge the following : 1) $200,000.00 received form checking and cash accounts of the corporation; 2) $200,000 received as goods and services through the improper use of corporate credit cards; and3) all promissory notes or other claims of loans in his name or inuring to his benefit, against the corporation.
June 11, 2003

---

Lance Wilson Clerk.
By Deputy Clerk, "s/ Kandy Sappozzi".

The court notes that there have heretofore been entered orders, pursuant to documents labeled as Consent and Undertaking, of Michael A. Sylver and Amazon Natural Treasures.com, formerly known as Amazon Natural Treasures, Inc.
Those orders are hereby incorporated into this court's judgment of the case and become part of this judgment.
One. Officer and Director Bar.

It is the decision and judgment of this court that the defendant Michael A. Sylver shall, and is hereby,

permanently barred from serving as an officer or director of any publicly-held corporation.

Even if the court believed all the testimony of Mr. Sylver, which it most certainly does not, it would still be compelled to find him substantially unfit to be an officer or director of a publicly-held corporation and not only to bar Mr. Sylver, but to bar him permanently from exercising authority over a publicly-held corporation as a director or an officer.
The reason for this bar is summed up in Mr. Sylver's own testimony when he declared yesterday, "I am the company". His actions, viewed in the light most favorable to him, clearly show that he considered this his company not the company of the shareholders. It was his to do with as he liked. It was his to use for his own purposes. The evidence is clear that he ran it for his benefit.

But the court does not believe the vast majority of the testimony and claims of Mr. Sylver. It finds incredible his attempted explanations and justifications. Unfortunately for him, the documents created to prove one theory of the justification were contradicted by him as he tried to prove alternative justifications.

I will not reiterate all the reason for this decision. The evidence speaks for itself, when considered in the light of his lack of credibility. Plaintiff's counsel in their closing argument provided a litany of the reasons Mr. Sylver cannot be trusted to run or exercise control over a public held corporation; I adopt that list. His testimony is contradicted by and flies in the face of the essentially corroborated testimony of the other witnesses.

No .2 Civil Penalties

The Securities and Exchange Commission seeks the third-tier civil penalties, which required, one, fraud, deceit, manipulation, or deliberative or reckless disregard of a regulatory requirement. These requirements are in the alternative, but the court is of the opinion that the evidence shows Mr. Sylver guilty of each. It also requires, too, a finding of a significant risk of substantial losses to other persons. There is not only a significant risk shown, but there is adequate evidence of actual losses to other persons.

While the court finds that Mr. Sylver has violated the relevant statues, it's unable to determine whether these actions are one large, on-going violation or multitude of violations. If a multitude, the court is unable to determine how many discrete violations

there are. However, the court notes that in the Consent and Undertaking of Michael A. Sylver, he agrees that he, "shall not raise as a defense that he is not liable for the payment of disgorgement or penalties because he did not violate one or more provisions of the Securities Act or Exchange Act". That's noted in the Consent, page 4.

Furthermore, inasmuch as the court will order disgorgement, it has no desire to doubly penalize Mr. Sylver for his actions. Accordingly, it will assess the statutory amount rather that a calculation based on amounts of pecuniary gain. Accordingly, it is the decision and judgment of this court that defendant Michael A. Sylver pay a third-tier penalty in the amount of $120,000.

3. Disgorgement.

The evidence shows hundreds of thousands of dollars in money and property have been taken out of this company by Michael A. Sylver through the deceptive and manipulative use of bank accounts, cash accounts, credit cards, and other means. The court is convinced of Mr. Sylver's accounting of monies representing transfers between corporate accounts. The evidence also shows there were other sums which did not inure to Mr. Sylver's benefit.

His explanations are patently false or unbelievable. Only by way of example, the court notes the claims of vast amounts of cash flowing through the petty cash accounts and checks made out to cash and endorsed by Mr. Sylver, or checks actually made out to and endorsed by Mr. Sylver were going for construction, when the records show hundreds of thousands of dollars going to various entities through checks or credit cards for the materials and the construction workers, and the construction workers were actually corporate employees duly receiving their wages through payroll accounts.

Furthermore, the court finds the tale of opulence demanded by the absent Loricchios as justification for the American Express credit card charges patently unbelievable, particularly in light of the opulent tastes of Mr. Sylver demonstrated by the company purchasing or leasing him a Jaguar and the opulence and appointment of his office. Considering that Mr. Sylver had no bank accounts or other source of income, except for claimed periodic and minimal assistance from his family, and the nature of some of the charges, the court is of the opinion that at least half of those charges for personal expenses must be attributed to his personal living expenses.

Finally, using promissory notes created – for the most part without benefit of evidence or legitimate corporate resolution – which were never seen or disclosed to anyone else, including the accounting personnel or outside accountants or independent auditors, Mr. Sylver attempted to justify money owed or received or received for personal loans he made to the company, or representing wages, salary, or other compensation he decided was due and owing, notwithstanding he was making representations to the Securities and Exchange Commission and to the public that the officers and directors, and he particularly, were not taking any compensation. Even the one so-called loan of something over $100,000, never seemed to be reduced by much although he admits taking $29,000 in payment against that so-called loan. The court finds these "loans" illegitimate, and further evidence of Mr. Sylver's belief that this was his company to do with as he pleases.

It is the decision and judgment of the court that the defendant Michael Sylver disgorge the following: One. $200,000 received from checking and cash accounts from the corporation.

Two. $32,322 received as goods and services through the improper use of corporate credit cards. And, Three. All promissory notes and other claims of notes in his name or inuring to his benefit against the corporation.

That is the judgment and decision of the court.